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<b>JAMES GURCIK, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 05-1344</b>
	)	<b>Issued: October 5, 2005</b>
	)	
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Bellmawr, NJ, Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

This case has twice been on appeal before the Board. In an August 13, 2002 decision, the Board set aside the Office's April 18 and December 21, 2000 decisions and remanded the case to the Office to determine appellant's impairment rating based on his bilateral carpal tunnel

syndrome. The Board found that the Office failed to consider the March 23, 2000 medical report of Dr. Kenneth C. Peacock, an orthopedic surgeon, and the August 31, 2000 report of Dr. David Weiss, an osteopath, in denying appellant's request for a merit review of his schedule award claim.<sup>1</sup> In a November 18, 2003 decision, the Board found a conflict in the medical opinion evidence between Dr. Craig H. Rosen, appellant's treating orthopedic surgeon, who opined that appellant had a 10 percent impairment of the right hand and a 3 percent impairment of the left, hand and an Office medical adviser, who found that appellant had a 7 percent impairment of the right hand only. On remand, the Board instructed the Office to refer appellant to an impartial medical specialist to resolve the conflict.<sup>2</sup> The facts and the history contained in the prior decision are incorporated by reference. The facts and the history relevant to the present issue are hereafter set forth.

On June 17, 1998 appellant, then a 58-year-old distribution clerk, filed an occupational disease claim alleging that his bilateral carpal tunnel syndrome was caused by factors of his federal employment. By letter dated July 17, 1988, the Office accepted appellant's claim for aggravation of bilateral carpal tunnel syndrome. Appellant retired from federal service on February 28, 1999. On December 22, 1999 the Office approved bilateral carpal tunnel syndrome surgery, bilateral electromyography and nerve conduction velocity tests and physical therapy for both wrists postsurgery 3 times a week for 90 days. Appellant filed a claim for a schedule award.

On remand following the Board's November 18, 2003 decision, the Office, by letter dated December 11, 2003, referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Zeidman submitted a December 29, 2003 medical report, in which he provided a history of appellant's problems with his upper extremities, medical treatment and complaints. He reviewed appellant's medical records and reported his findings on physical examination. Dr. Zeidman found full motion of the cervical spine without tenderness or spasm. Regarding appellant's hands and wrists, he noted surgical scars bilaterally that were well healed and nontender. A Tinel's sign was positive over both wrists in the region of the median nerve but manual muscle testing was symmetrical bilaterally. Dr. Zeidman stated that there was no evidence of any atrophy in the arms or hands. Sensory and motor functions appeared intact and thenar muscle masses were evident and symmetrical bilaterally. Dr. Zeidman opined that despite appellant's ongoing symptoms in both hands, he had no sign of any functional disability related to the employment-related carpal tunnel syndrome or any evidence of sensory or motor loss. Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) 495, (5<sup>th</sup> ed. 2001), Dr. Zeidman determined that appellant's condition fell into the second scenario, that of normal sensibility and strength with abnormal latencies and abnormal electromyogram (EMG) testing. He then opined that residual carpal tunnel syndrome was present. Dr. Zeidman stated that since the main problem was pain, appellant's pain appeared

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<sup>1</sup> Docket No. 01-1202 (issued August 12, 2002).

<sup>2</sup> Docket No. 03-1106 (issued November 18, 2003).

to be mild with a pain-related impairment increasing his burden slightly based on the A.M.A., *Guides* 574, 575. He stated:

“This problem is further elucidated in Table 16-10 on [p]age 482 and Table 16-15 on [p]age 492. Median nerve sensory deficit would have a maximum of 40 percent involving the median nerve in each arm, with a Grade [4] deficit. This would, therefore, be consistent with a three percent impairment for the left upper extremity and a four percent [impairment] in the right upper extremity, consistent with increased reports of difficulty in this extremity. Summation, therefore, would be that of a seven percent impairment.”

On January 20, 2004 an Office medical adviser reviewed Dr. Zeidman’s December 29, 2003 report. The Office medical adviser stated that the findings reported by Dr. Zeidman supported a diagnosis of bilateral carpal tunnel syndrome with Grade 4 sensory deficit based on the A.M.A., *Guides* 482, Table 16-10. The Office medical adviser agreed with Dr. Zeidman’s calculations, noting that he used the appropriate tables and calculations in determining appellant’s impairment rating.

By decision dated March 5, 2004, the Office found that appellant was not entitled to more than a seven percent impairment, for which he already received a schedule award. The Office accorded special weight to Dr. Zeidman’s December 29, 2003 medical report. By letter dated March 10, 2004, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

In a decision dated February 4, 2005, a hearing representative affirmed the Office’s March 5, 2004 decision as modified to reflect that appellant was entitled to a schedule award for a four percent impairment of the right hand and a three percent impairment of the left hand totaling a seven percent impairment of the upper extremities based on Dr. Zeidman’s opinion. The hearing representative also found that appellant’s counsel’s argument that Dr. Zeidman was improperly selected as an impartial medical examiner was without merit.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees’ Compensation Act<sup>3</sup> and its implementing regulation<sup>4</sup> sets forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.<sup>5</sup> However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> 5 U.S.C. § 8107(c)(19).

equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.<sup>6</sup>

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>7</sup>

Section 8123(a) of the Act provides: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>8</sup> When a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

### ANALYSIS

To resolve the conflict in the medical opinion evidence found by the Board, in the November 18, 2003 decision, regarding the extent of impairment of appellant's right and left upper extremities, the Office referred appellant to Dr. Zeidman, selected as the impartial medical specialist. On physical examination, Dr. Zeidman reported full motion of the cervical spine without tenderness or spasm, surgical scars bilaterally on appellant's hands and wrists that were well healed and nontender, a positive Tinel's sign over both wrists in the region of the median nerve, no atrophy in the arms or hands, sensory and motor functions which appeared intact and thenar muscle masses that were evident and symmetrical bilaterally. Dr. Zeidman opined that despite appellant's ongoing symptoms in both hands, he had no sign of any functional disability related to the employment-related carpal tunnel syndrome or any evidence of sensory or motor loss. Utilizing the A.M.A., *Guides*, 495, he determined that appellant's condition fell into category two, that of normal sensibility and strength with abnormal latencies and abnormal EMG testing. Dr. Zeidman opined that residual carpal tunnel syndrome was present. He considered appellant's pain to be mild with a pain-related impairment increasing his burden slightly based on the A.M.A., *Guides* 574, 575. Utilizing the A.M.A., *Guides* 482, 492, Tables 16-10 and 16-15, Dr. Zeidman determined that the median nerve sensory deficit had a maximum of 40 percent in each arm with a Grade 4 deficit, which constituted a 3 percent impairment of the left upper extremity and a 4 percent impairment of the right upper extremity.

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<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

<sup>8</sup> *Richard L. Rhodes*, 50 ECAB 259 (1999); *Noah Ooten*, 50 ECAB 283 (1999); *Rosita Mahana (Wayne Mahana)*, 50 ECAB 331(1999); *Richard Coonradt*, 50 ECAB 360 (1999); *Gwendolyn Merriweather*, 50 ECAB 411 (1999); *Marsha R. Tison*, 50 ECAB 535(1999).

<sup>9</sup> *James R. Driscoll*, 50 ECAB 146 (1998).

The Board notes that Dr. Zeidman incorrectly identified appellant's 40 percent median nerve sensory deficit as Grade 4 sensory deficit. Rather, the A.M.A., *Guides* 482, Table 16-10, provide that 40 percent median nerve sensory deficit is classified as a Grade 3 sensory deficit or pain. Dr. Zeidman did not explain how he used Table 16-15 of the A.M.A., *Guides* to determine the impairment rating of appellant's right and left upper extremities. In his report, he failed to provide the maximum impairment of each upper extremity due to sensory deficit or pain of the median nerve. This table provides a range from 0 to 39 percent for pain. Therefore, the Board finds that Dr. Zeidman's report is not sufficiently rationalized to resolve the conflict. The Office should request clarification of Dr. Zeidman's opinion on the issue of impairment.

### **CONCLUSION**

The Board finds that this case is not in posture for decision on the issue of the whether appellant has more than a four percent permanent impairment of the right hand and a three percent permanent impairment of the left hand, for which he received a schedule award, due to an unresolved conflict in medical opinion evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: October 5, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board